IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD, and GEORGE E. STARBUCK,

Appellants,

—v.—

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Appellants,

—v.—

Board of Regents of the University of the State of New York, Board of Trustees of the State University of New York, State University of New York at Buffalo, Clifford C. Furnas, J. Lawrence Murray, Arthur Levitt, Department of Civil Service of the State of New York, Civil Service Commission of the State of New York, Mary Goode Krone, and Alexander A. Falk,

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Interest of the *Amici*

The American Civil Liberties Union and the New York Civil Liberties Union, which file this brief with the consent of the parties, believe that the case at bar raises fundamental First Amendment questions. To require the execution of loyalty oaths and conformance to "anti-subversive" statutes by petitioners and other applicants for public employment substantially restricts the free expression of unpopular beliefs and ideas.

Questions Presented

(1) Whether the statutes in question unconstitutionally limit public employment of teachers and scholars at the university level because they restrain speech protected by the First Amendment as made applicable to the States by the Fourteenth; and

(2) Whether the statutes and administrative rules and procedures are unconstitutional since, taken as a whole, their effect is substantially to restrict First Amendment freedoms without substantially enhancing any legitimate state interest which could not be as well served by means less restrictive of such freedoms.

Statutes Involved

Section 3021, New York Education Law, is captioned, "Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances," and provides:

> "A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

Section 3022, New York Education Law, is captioned, "Elimination of subversive persons from the public school system," and provides:

> 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers

or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it.

The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

SUBDIVISION 1 OF SECTION 105, NEW YORK CIVIL SERVICE LAW, is captioned, "Ineligibility of persons advocating overthrow of government by force or unlawful means," and provides:

"No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any

state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or become a member of any society or group of persons which teaches or advocates that the government of the United States or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof."

Subdivision 3 of Section 105, New York Civil Service Law, is captioned, "Removal for treasonable and seditious acts or utterances," and provides:

"A person in the civil service of the state or of any civil division thereof shall be removable therefrom for

the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the penal law; a seditious word or act shall mean 'criminal anarchy' as defined in the penal law."

SECTIONS 160 AND 161 OF THE NEW YORK PENAL LAW provide:

"SECTION 160. *Criminal anarchy defined.*

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"SECTION 161. *Advocacy of criminal anarchy.*

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching

the doctrine that organized government should be overthrown by force, violence or any unlawful means; or

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or for any civilized nation having an organized government, because of his official character, or any other crime, without intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

Statement of the Case

This suit challenges the constitutionality of Section 105 of the New York State Civil Service Law and the statutes incorporated by reference therein, Sections 3021 and 3022 of the New York Education Law, Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York (hereinafter referred to as the Regents Rules), and the certificates and procedures used under the various statutes and rules. The statutes, in general, provide for the elimination from employment in state-supported schools, colleges and universities of persons deemed "subversive". The administrative program requires, as a

condition of employment, the execution of a disclaimer and loyalty certificate. Plaintiffs sued as teachers and employees at the State University of New York at Buffalo. Plaintiffs Keyishian, Hochfield, Garver and Maud declined to sign the Trustee's Certificate and because of this failure, dismissal proceedings were brought against them on grounds of insubordination. Plaintiff Keyishian's term has ended and it has not been renewed because of his failure to sign the certificate. Plaintiffs Hochfield's and Garver's terms have not expired and they have been informed dismissal proceedings have been stayed pending the outcome of this suit. Plaintiff Maud has resigned from the University. Plaintiff Starbuck has been terminated because he failed to answer whether he had ever advised, taught or been a member of a group that taught or advocated the overthrow of the government by force and violence.

This appeal is from the decision of a three judge district court (R. 278 *et seq.*) which denied all the relief requested by the appellants.

ARGUMENT

I.

The statutes in question unconstitutionally limit public employment of teachers and scholars at the university level because they restrain speech protected by the First Amendment as made applicable to the states by the Fourteenth.

A. *A statute which imposes conditions to public employment having the effect of restricting First Amendment freedoms is subject to the "balancing" test to determine its constitutionality.**

It is now abundantly clear that state employees, and particularly teachers, enjoy the protection of freedom of speech, thought, and association guaranteed by the First Amendment as made applicable to the states by the Fourteenth. The notion which once enjoyed some currency, that public employment and other government benefits, since they might be withheld altogether, may be subjected to any conditions which the state chose to impose, has been thoroughly discredited. *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961); *Torcaso* v. *Watkins,* 367 U. S. 488 (1961); *Shelton* v. *Tucker,* 364 U. S. 479 (1960); *Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956); *Wieman* v. *Updegraff,* 344 U. S. 183

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* *Amici* believe that where First Amendment rights are at stake, the clear and present danger test is best designed to give widest latitude to the precepts of a free society without endangering competing social interests. For the purposes of this case, however, we confine the argument to the "balancing" test because we believe the statutes at bar are unconstitutional even under that narrower formulation.

(1952); *U. S.* v. *Lovett,* 328 U. S. 303 (1946), see Willcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 Cornell L. Q. 12 (1955).

Wieman v. *Updegraff, supra,* held unconstitutional an Oklahoma statute which required every state employee, as a condition of employment, to execute an oath to the effect that he was not affiliated with any organization which had been listed by the United States Attorney General as subversive. The Court held:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one. Indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy'. Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner, Adler* and *Gerende* [in which only knowing membership was at issue] is decisive. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process" (344 U. S. at 190-191).
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> * * * * *
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> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the

> public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory" (344 U. S. at 192).

When conditions to public employment restrict First Amendment freedoms, it is no longer sufficient that they be merely "not patently arbitrary or discriminatory." *Shelton* v. *Tucker, supra,* clearly holds that such conditions must meet the standards of a full scale "balancing" test. *Shelton* declared unconstitutional an Arkansas statute which required every teacher, as a condition to employment in a state-supported school or college, to file annually an affidavit listing every organization to which he had belonged or regularly contributed within the preceding five years. The Court held:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose" (364 U. S. at 488).

The statutory complex and administrative procedures challenged by appellants directly impinge on the area protected by the First Amendment. They impose direct restrictions on speech and association, both as a condition of employment, as well as its continued retention. As was noted in *Shelton, ibid.,* the "administrative leeway" which is permissible in the service of a clearly constitutional purpose in other areas cannot be justified in the First Amendment's sphere.

The "balancing" test has also been adopted in other closely analogous contexts involving the imposition of conditions impairing First Amendment freedoms to the enjoyment of other state-conferred "privileges". *N. A. A. C. P.* v. *Alabama,* 377 U. S. 288 (1964) (right of foreign corporation to do business within state); *Speiser* v. *Randall,* 357 U. S. 513 (1958) (tax exemption).

B. *The effect of the statutes in question is to restrain significant areas of constitutionally-protected speech.*

The statutes called into question by the present suit are Section 3021 of the New York Education Law and Section 105 of the New York Civil Service Law, which are discussed here and Section 3022 of the New York Education Law which is discussed in Point II, *infra.*

These statutes intrude into constitutionally-protected areas of speech for they impose, through conditions to employment, a broader proscription of speech than could be constitutionally imposed by means of a direct restriction in two respects: first, in the use of the word "seditious", and second, in the failure to distinguish between advocacy of abstract doctrine and advocacy that incites to action.

In the absence of further definition, the word "seditious" as it appears in Section 3021, New York Education Law, would seem obviously to include within its coverage a substantial though indeterminate area of constitutionally-protected speech. Consider, for example, this definition of "sedition":

> "Excitement of discontent against the government, or of resistance to lawful authority." (Webster's New Collegiate Dictionary, 1958.)

Although the majority of the Court in *Adler* v. *Board of Education,* 342 U. S. 485 (1952), did not pass on the constitutionality of Section 3021 (342 U. S. at 496), Mr. Justice Frankfurter pointed out in his dissenting opinion:

> "In the light of the experience under the Sedition Act of 1798, 1 Stat. 596, 'seditious' can hardly be deemed a self-defining term or a word of art" (342 U. S. at 506).

"Seditious" is one of those words well calculated to arouse passion and prejudice. Almost any change which is strongly resisted by those in power has been so denominated. Scottish judges once so labeled the demand for manhood suffrage.*

Quite possibly, the word "seditious" as used in Section 3021 of the Education Law might be construed to have the same meaning as is used in Section 105, Subdivision 3, of the Civil Service Law, which in turn refers to the Penal Law definition of "criminal anarchy." ** Even assuming this to be true, however, we are still left with a definition which is too broad, since Section 160 of the Penal Law does not specify what organized governments are referred to. The words "organized government" are not preceded by an article or qualifier of any kind. And whether or not Section 161 of the Penal Law is directly incorporated in Section 105, Subdivision 3, of the Civil Service Law, it is certainly relevant in construing Section 160 of the Penal

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* See Chafee, Free Speech in the Constitution (1941), p. 26, citing May, Constitutional History, II, 38-41.

** There is however no legislative declaration that Education Law, Section 3021, is similarly limited, although the Court of Appeals assumed that they would be defined in the same way.

Law; and Subdivision 3 of Section 161 indicates that the reference is to *any* organized government, whatever its nature, foreign or domestic.

Section 161 of the Penal Law contains four subdivisions, each of which in some manner restricts freedom of expression or of association. It forbids not only the advocacy of the commission of certain acts declared illegal by Section 160 but also advising or teaching the propriety of such acts. Subdivision 2 is particularly comprehensive since it deals with the distribution of any material "containing" the doctrine of the overthrow of the government by force. That would probably ban the distribution of any material that discussed the pros and cons of revolution and might even include our Declaration of Independence.

It is shocking to contemplate that teachers, especially in institutions of higher learning, should be subject to loss of jobs if they have ever done anything coming within any of these vague and all-embracing provisions.

These observations, of course, apply specifically to Civil Service Law Section 105, subd. 1, which includes, in identical language, subdivisions 1, 2, and 4 of Penal Law Section 161.

The second respect in which the statutes restrain constitutionally protected speech is, as already mentioned, their failure to distinguish between advocacy of abstract doctrine and advocacy that incites to action. *Dennis* v. *United States, supra,* upheld the constitutional validity of the Smith Act, 18 U. S. C. §2385, which proscribes the forbidden conduct in much the same language as appears in Subdivision 1 of Section 105 of the New York Civil Service Law. The limited scope of the *Dennis* decision, however, was made very clear in two subsequent cases, *Yates*

v. *United States,* 354 U. S. 298 (1957), and *Noto* v. *United States,* 367 U. S. 290 (1961).

In *Yates* v. *United States,* it was said:

> "We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not" (354 U. S. at 318).
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> "We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation . . . The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government and not of principles divorced from action" (354 U. S. at 319-20).
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> ". . . [T]he District Court apparently thought that Dennis obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action.
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> "This misconceives the situation confronting the Court in Dennis and what was held there" (354 U. S. at 320-1).

And in *Noto* v. *United States,* the distinction was:

> "... 'not of ... mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to ... action' immediately or in the future" (367 U. S. at 297).
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> "We held in Yates, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action" (367 U. S. at 297-8).

Though *Yates* and *Noto* were decided by construction of the statute involved rather than on a constitutional base, it was clear that what was being skirted was "a constitutional danger zone ... clearly marked" (*Yates,* 354 U. S. at 319). It might be argued that the statutes at bar, like the Smith Act, are capable of the restrictive construction of *Yates* and *Noto.* In reply, it is necessary only to point out that there has been no such construction of the present statutes.

C. *The proscription of a substantial area of constitutionally-protected speech on the part of all publicly-minded university teachers and scholars, both within and without the classroom, constitutes so serious a restriction of freedom of speech as to be incapable of justification by any present legitimate state interest.*

The rationale of freedom of speech as guaranteed by the First Amendment has been stated too well elsewhere to bear restatement here. See *Gitlow* v. *New York,* 268 U. S. 652, 672-3 (1925) (dissenting opinion of Mr. Justice Holmes); *Whitney* v. *California,* 274 U. S. 357, 373-9 (1927) (concurring opinion of Mr. Justice Brandeis).

We submit that nowhere is the full scope of constitutionally protected freedom of speech more appropriate and nowhere more essential than in our colleges and universities. Consequently, the states cannot constitutionally impose as a condition to employment at the university level an absolute restraint upon a substantial area of constitutionally protected speech, operative upon all publicly-employed teachers and scholars within and without the classroom.

In *Barenblatt* v. *United States,* 360 U. S. 109, 112 (1959), the Court stated:

> "Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain."

In *Shelton* v. *Tucker,* 364 U. S. 479, 487, the Court observed:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers * * * has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (concurring opinion)."

In *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250, 251 (1957), it was said:

"The essentiality of freedom in the community of American universities is almost self-evident. * * * Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

* * * * *

"We do not conceive of any circumstances wherein a state interest would justify infringement of rights in these fields."

The view expressed in the last quotation follows inescapably from a consideration of the functions served by our colleges and universities in the light of the rationale of constitutional protection of freedom of speech. If this be true, then the statutes in question are unconstitutional.

II.

The statutes and administrative rules and procedures are unconstitutional since, taken as a whole, their effect is substantially to restrict First Amendment freedoms without substantially enhancing any legitimate state interest which could not be as well served by means less restrictive of such freedoms.

The statutory and administrative scheme in question is shot through with defects and uncertainties, several of which would independently suffice to raise serious constitutional questions, and all of which taken together renders the scheme clearly unconstitutional.

The present case was precipitated by the refusal of plaintiffs to execute the so-called "Trustee's Certificate." The Certificate exists in two forms, copies of which are annexed to the complaint as Exhibits "A" and "B" respectively.

Exhibit "A" follows:

"STATE UNIVERSITY OF NEW YORK AT BUFFALO

CERTIFICATE

Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.

Anyone who was previously a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof is directed to confer with the President before signing this certificate.

* * * * *

This is to certify that I have read the publication of the University of the State of New York, 1959, entitled 'Regents Rules on Subversive Activities' together with the instructions set forth above and understand that these rules and regulations as well as the laws cited therein are part of the terms of my employment. I further certify that I am not now a member of the Communist Party and that if I have ever been a member of the Communist Party I have communicated that fact to the President of the State University of New York.

....

Date Signature "

Exhibit "B" differs only in that it expects from the rules, regulations and laws made a part of the signer's terms of employment, the "Education Commissioner's Memorandum" (Regents Rules on Subversive Activities, pages 9-12 (1959)).

Appellants have alleged in paragraphs twenty-ninth, thirtieth and forty-second of the complaint that their employment will be terminated without a hearing for their failure to execute the Certificate.

The Certificate states categorically:

> "Anyone who is a member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University."

Further, several plaintiffs will have their employment terminated for the simple reason of their failure to execute the Certificate. Since a present member of the Communist Party or of any organization that advocates violent overthrow could not truthfully execute the Certificate, the effect would be termination of employment for innocent as well as "knowing" membership. This result, which would follow both from an application of the language of the Certificate and from the threatened outright termination of employment for refusal to execute the Certificate, would be clearly unconstitutional. *Wieman* v. *Updegraff, supra.* It is recognized that the Feinberg Law, Section 3022, New York Education Law, has been construed to apply only to "knowing" membership and to provide that such membership constitutes only a presumptive ground for disqualification, which may be rebutted by the person charged at the hearing in which the presumption arises. See *Adler* v. *Board of Education,* 342 U. S. at 494-5.

Such a construction is no longer sufficient. "Knowing membership" alone is not enough; proof of such membership together with "specific intent" to further unlawful ends *and* actual participation in unlawful activities must all be shown, if the requisite standards of the First Amendment are to be met. As was said in *Elfbrandt* v. *Russell*:

"Any lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent', would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State,* 378 U. S. 500." 384 U. S. at 16.

"Nothing in the oath, the statutory gloss, or the construction of the oath and statutes given by the Arizona Supreme Court, purports to exclude association by one who does not subscribe to the organization's unlawful ends. Here as in *Baggett* v. *Bullitt, supra,* the 'hazard of being prosecuted for knowing but guiltless behavior' (*id.,* at 373) is a reality." 384 U. S. at 16.

"Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action, impose, in effect, a conclusion presumption that the member shares the unlawful aims of the organization." 384 U. S. at 17.

In view of the fact that the "Education Commissioner's Memorandum" is expressly excepted from the scope of the form of the Certificate set forth as Exhibit "B" to the complaint, it is quite possible that the "Memorandum" is not intended to be included within the rules and regulations referred to in either form of the Certificate. This point is not made clear, however, and the "Memorandum" is itself a source of confusion, suggesting an unconstitutional application of the statutes. For example, the "Memorandum," at page 12 of "Regents Rules on Subversive Activities," states:

> "But the statutes and the Regents Rules make it clear that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher *in whose case there is evidence that he is guilty* of subversive activity." (Emphasis added.)

This statement, if taken literally, and in combination with the requirement that the teacher, as a condition to further employment, execute the disclaimer embodied in the Certificate, would seem clearly to contravene the holding in *Speiser* v. *Randall, supra,* that when First Amendment freedoms are at stake, the burden of proof cannot be shifted from the government to the individual.

Consider also the remoteness of the inquiry as to past membership, whether "knowing" or "innocent", in the Communist Party. Disclosure is required, for example, even of innocent membership during the 1930's. Cf. *Schwdre* v. *Board of Bar Examiners,* 353 U. S. 232 (1957); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 534 (1963).

The kind of membership proscribed under the present statutes, since it is not limited to "active" membership, is apparently broader than could be constitutionally proscribed by means of direct criminal sanctions. Cf. *Scales* v. *United States,* 367 U. S. 203 (1961).

The means of enforcement of the statutes spelled out in the "Regents Rules on Subversive Activities," together with the requirement that all teachers execute the Certificate, with its blanket disclosure requirement, might very well constitute the sort of "systematic and continuous surveillance" referred to as a dubious possibility by Mr.

Justice Frankfurter in his opinion in *Adler* v. *Board of Education,* 342 U. S. at 507, in which he dissented on the essentially procedural ground that the claim before the Court was too abstract.

Attempting merely to determine the extent to which these statutes apply to university teachers is a complicated task. Section 3021, New York Education Law, purports to apply only to "public schools, in any city or school district." And Section 3022 does not necessarily render Section 3021 applicable to university teachers, for it refers to persons "who violate the provisions of section three thousand twenty-one of this article *or* who are ineligible . . . on any of the grounds set forth in Section twelve-a of the Civil Service Law [now Section 105, subdivisions 1 and 2]" (emphasis added). The Certificate, however, purports to make Section 3021 applicable to university teachers, since it (Section 3021) is set forth and cited in the publication entitled "Regents Rules on Subversive Activities," which is incorporated by reference in the Certificate.

A further point of uncertainty as to the application of the statutes exists in the fact that Section 3022, Subdivision 1, New York Education Law, provides that the Board of Regents shall adopt rules and regulations for the disqualification or removal of persons who violate Section 3021 of the Education Law or are ineligible under Section 12-a (now Section 105, Subdivisions 1 and 2) of the Civil Service Law. Yet the Regents Rules apparently are directed only to "the school authorities of each school district." Rules of the Board of Regents, Section 244 (as published in "Regents Rules on Subversive Activities," *supra,* at page 5), Section 20.1 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

When these difficulties of construction are added to the sources of uncertainty and confusion already mentioned, both under the present Point and Point I—most notably the lack of distinction between advocacy of abstract doctrine and incitement to action, uncertainty and overbroadness of the meaning of "seditious", uncertainty as to the effect of the "Education Commissioner's Memorandum," and treatment, both in the Certificate and the alleged procedure for termination of employment, of membership as a *per se* ground of disqualification—it hardly does justice to the situation to term it confusing in the extreme.

A teacher required to sign this Certificate is not only confronted with a statement of the law which either is inadequate and misleading or is clearly unconstitutional, he is not only asked to make a blanket disclosure of any membership in the Communist Party, whether innocent or "knowing" and no matter how remotely in the past, but he is required to signify his assent to a hopelessly confusing jumble of statutes, rules and administrative procedures and statements, the full scope of which is practically impossible to determine but which would seem to intrude significantly into areas of constitutionally-protected freedom of speech and association. A conscientious person could reasonably fear that he is asked to agree in advance to refrain from some unascertainable area of constitutionally-protected speech and association. As in *Cramp* v. *Board of Public Instruction*, 368 U. S. at 286:

> "The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive."

The requirement that, as a condition to public employment, plaintiffs and all other university teachers and scholars execute this Certificate is, we submit, unconstitutional under the rationale of *Baggett* v. *Bullitt, supra*:

"As in *Cramp* v. *Board of Public Instruction*, '[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms, affirmatively protected by the Constitution.' 368 U. S. 278, 287. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker—teachers and public servants—to 'steer far wider of the unlawful zone' Speiser v. Randall, 357 U. S. 513, 526 than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.

* * * * *

"Nor should we encourage the casual taking of oaths by upholding the discharge or exclusion from public employment of those with a conscientious and scrupulous regard for such undertakings.

* * * * *

"The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscien-

> tiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where 'the free dissemination of ideas may be the loser.'"

The purported justification for this infringement upon freedom of speech and association is stated in the preamble to the Feinberg Law (Section 3022, New York Education Law) as follows:

> "The legislature finds that members of such [subversive] groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine *without regard to truth* or free inquiry" (emphasis added). (Laws of New York 1949, Chapter 360, Section 1.)

Given this finding, it is hardly reasonable to expect the Certificate to operate as an effective self-disclosure device in the elimination of subversives. In any event, there can be no reasonable justification for the breadth and uncertainties of the Certificate and the complex of statutes, rules and procedures in which it is set. The most likely result of the statutory and administrative scheme in question will not be to screen out active Communists, but rather to force the withdrawal from teaching of persons who for reasons of conscience will not submit to governmental inquiry into political belief and association, and to sweeping and ill-defined restrictions upon their freedom of expression as part of their contract of employment.

To conclude, we submit that the present jumble of statutes and administrative regulations severely impair First

Amendment rights without any substantial enhancement of a legitimate state interest and without any evidence that there are not less restrictive means available to accomplish the basic state purpose. The statutes and administrative rules and procedures are, therefore, unconstitutional.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

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